UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

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| In Re:<br><br>C. WALTER WEISS, and wife PAULETTE H. WEISS,<br><br>Debtors. | Case No. 87-10330<br>Chapter 7<br><br>JUDGMENT ENTERED ON 9-15-92 |

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| In Re:<br><br>C. WALTER WEISS, and wife PAULETTE H. WEISS,<br><br>Debtors. | Case No. 87-10330<br>Chapter 7 |
| FRANCIS JOSEPH MCGAHREN,<br><br>Plaintiff,<br><br>v.<br><br>BARBARA A. HECK, Trustee,<br><br>Defendant. | Adversary Proceeding<br>No. 92-1066 |

**ORDER DENYING REQUEST FOR RECUSAL**

This matter is before the court upon Francis J. McGahren's ("plaintiff") affidavit seeking the appointment of an alternative judge pursuant to Title 28 U.S.C. § 144.[1] The action is a request for recusal pursuant to § 144. This Order also addresses recusal pursuant to Title 28 U.S.C. § 455. After a review of the

[1] The Affidavit was filed in the adversary proceeding, however, a request for recusal mandates an evaluation of all the circumstances and actions involving Mr. McGahren including those in the base case. For purposes of this Order Mr. McGahren will be referred to as the plaintiff although he is not a "plaintiff" in the base case.

record and the supporting Affidavit the court concludes that the Affidavit is without legal sufficiency and should therefore be denied. Further, recusal sua sponte is not warranted under § 455.

**FACTS AND PROCEDURAL HISTORY**

Because a request for recusal requires a thorough examination of the record, a detailed summary of the events in this case is required.

1. Plaintiff, appearing pro se, initiated an adversary proceeding on March 4, 1992 alleging that the Chapter 7 Trustee, Barbara A. Heck, was negligent in the performance of her fiduciary duties owing to the Chapter 7 estate with respect to certain real property in which the debtor and plaintiff each owned a fifty percent (50%) interest.

2. Plaintiff was also an active participant in several hearings in the base case concerning this same real property. On March 18, 1992 a hearing was held in the base case on the Trustee's Motion to Abandon the Property or Declaration of Status. After hearing the arguments of counsel and parties in interest the court made the determination that the Trustee should abandon the property. There appeared to be some title questions which the court thought would better be resolved in state court. Additionally there was little or no equity in the property and consequently, little, if any, benefit to the estate. An Order was entered in the base case on April 10, 1992 allowing the

Trustee to abandon the property. Plaintiff filed a Notice of Appeal of the abandonment on April 17, 1992.

3. On April 2, 1992 the Trustee filed a Motion to Dismiss the adversary proceeding for insufficiency of process, insufficiency of service of process and failure to state a claim upon which relief could be granted. The motion and the certificates of service were issued in the name of David G. Gray, Jr., attorney for the Trustee, however, Mrs. Heck, the Trustee (and a member of Mr. Gray's law firm) actually signed the papers. The Notice of Hearing, filed April 3, 1992, was issued and signed by Mr. Gray. Pursuant to Bankruptcy Rule 7012 and Federal Rule of Civil Procedure 12 the filing of the motion stayed the Trustee's obligation to answer the Complaint until the court disposed of the motion.

4. On April 9, 1992 the bankruptcy clerk's office received a letter from plaintiff, addressed to "Robin Ward", a deputy clerk in the bankruptcy clerk's office. The letter alleged that the Trustee's motion to dismiss was improperly filed, and therefore defective, for several reasons: First, because Mr. Gray had not actually signed the motion; second, because the signature dates on the motion and certificates of service reflected that they were signed on April 1, 1992 and, in contrast, the notice of hearing reflected a signature date of April 2, 1992; and third, because the motion to dismiss was based upon a claim of improper service, which plaintiff contested. The court did not respond to the letter.

5. On April 29, 1992 Plaintiff filed a "Motion for Entry of Default Judgment (Pursuant to Rule 55.(a) F.R.Civ.P. and Local Bankruptcy Rule 170 W.D.)" alleging that the Trustee failed to timely answer the Complaint and asserting the same deficiencies with the motion to dismiss as reflected in plaintiff's letter of April 9, 1992.

6. On May 20, 1992 a hearing was held on the Trustee's motion to dismiss and plaintiff's motion for entry of default judgment. At the hearing both parties claimed service defects. Plaintiff had attempted service by sliding the Summons and Complaint under the door of the offices where the Trustee and Mr. Gray were employed. Although plaintiff alleged that he obtained proper service of the Complaint at a later time, there is nothing in the file to support this allegation. Plaintiff alleged that service of the motion to dismiss was improper because David Gray's signature was "forged" on the certificate of service and the motion. The court determined that the improper signatures on the motion to dismiss and the certificates of service did not render the filing invalid. Nevertheless, the court denied the motion to dismiss on its merits and cured plaintiff's service defect by deeming the Complaint filed and properly served as of that date (May 20, 1992). As such, plaintiff's motion for entry of default judgment was denied. The Trustee had prepared an Answer which was docketed at the hearing. The Trustee formally served a copy of the Answer on the plaintiff on May 27, 1992.

7. On May 27, 1992 the court issued a Pre-trial and Scheduling Order, indicating, among other things, "[t]hat all amendments to pleadings and joinder of parties be completed within fourteen days of this Order."

8. On June 12, 1992 the bankruptcy clerk's office received a faxed copy of an "Amended Complaint in Adversary Proceeding". Local Bankruptcy Rule 121 requires a party to obtain an order from the court authorizing the Clerk to accept facsimile filings. Notwithstanding the absence of such an order, the court accepted the filing. Plaintiff later sent a hard copy of the Amended Complaint.

9. On June 16, 1992 plaintiff filed a Motion for Stay of Order of Abandonment Pending Appeal.

10. On June 20, 1992 plaintiff filed a Request for Production of documents from First Citizen's Bank.

11. On July 27, 1992 the court held a hearing in the base case on plaintiff's Motion for Stay of Order of Abandonment Pending Appeal and upon First Citizens' Objection to Request for Production and Rule 11 sanctions. At the hearing the court first addressed plaintiff's motion for stay pending appeal. The court explained to plaintiff that the papers filed with the court did not support his request. The court then explained the criteria for granting a stay pending appeal and gave plaintiff an opportunity to satisfy them. Plaintiff's oral argument failed to set forth the required elements for a stay pending appeal which include a balance of hardships test, a showing of likelihood of

success on the merits and possible public policy concerns. The court therefore denied the motion.

First Citizens' objection to the request for production of documents was well founded since they were not subject to discovery by way of document requests. Plaintiff's request related to information regarding the pending adversary proceeding to which First Citizens is not a party and not to any issues on appeal in the base case. Thus, the court sustained First Citizens' objection but declined to issue sanctions at that time.

12. On July 31, 1992 plaintiff filed an Affidavit pursuant to 28 U.S.C. § 144 which is the subject of this Order. The Affidavit is attached as Exhibit A and incorporated herein by reference. The Affidavit was not served on any other party. The clerk's office failed to notify the court of the Affidavit and therefore, it was not considered until recently when it was discovered in the file.

13. On August 3, 1992 the court received "Plaintiff's Request for Entry of Default and Affidavit of Sum Certain Amount for Damages and Costs" for the Trustee's failure to answer the Amended Complaint filed with the court on June 12, 1992. Plaintiff requested that the default judgment be entered by the Clerk pursuant to Rule 55(b)(1); however, because the defendant had appeared previously in this adversary proceeding, default judgment could only be rendered by the court pursuant to Rule 55(b)(2). On August 7, 1992 the court entered, without hearing, an Order denying plaintiff's request. Plaintiff failed to comply

with Federal Rule of Civil Procedure 15(a) requiring the plaintiff to seek leave of court or to obtain consent of the adverse party to amend his Complaint. As such, the Trustee was under no duty to answer the Amended Complaint.[2] On August 17, 1992 plaintiff filed a Notice of Appeal of the Order denying plaintiff's request for default judgment.

**DISCUSSION**

Title 28, Judiciary and Judicial Procedure sets forth two circumstances in which federal judges must refrain from presiding over legal proceedings. First, § 144 operates only when one party files an affidavit with the court alleging bias or prejudice. Second, § 455 is self-enforcing and sets forth specific circumstances when judges must recuse themselves from the proceeding without any action from the litigants. Bankruptcy Rule 5004 governs the application of § 455 to bankruptcy judges.

Although plaintiff may be unhappy with the outcome of the proceedings to date, there is nothing in the record nor off the record to warrant recusal under either section of Title 28. The determining factor in these analyses is that there is no extra-judicial bias or prejudice to support the plaintiff's request. Plaintiff's allegations toward the judge stem from events arising from the numerous hearings and filings in this case, none of which require or warrant recusal.

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[2] Plaintiff informed the court's law clerk that he interpreted the language in the Pre-trial and Scheduling Order requiring that "all amendments to pleadings and joinder of parties be completed within fourteen days" as an authorization by the court to amend the Complaint without further action.

A. Recusal Pursuant to Section 144:

Title 28 U.S.C. § 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
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> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Plaintiff filed an Affidavit pursuant to 28 U.S.C. § 144 wherein he contends that he will not receive a fair hearing or trial before the undersigned judge due to the judge's perceived bias against the plaintiff. In support of this assertion, plaintiff alleges the following:

1) That the judge is biased toward pro se litigants;

2) That the judge has an on-going professional relationship with the Trustee such that it "preclude[s] the administration of justice;"

3) That the judge has developed a "prejudicial pattern [in the hearings that] will only worsen;"

4) That the judge has granted the Trustee special consideration in the hearings;

5) That the judge has been rude and impatient with the plaintiff in the hearings;

6) That the judge has assumed the role of defense attorney for the Trustee; and

7) That the judge has engaged in ex parte contact with the Trustee.

The judge against whom the § 144 affidavit is filed may pass on the legal sufficiency of the affidavit as well as the timeliness. Berger v. United States, 255 U.S. 22, 32-34 (1922). The standard for determining whether such bias exists is whether the stated facts, if true, would convince a reasonable man that actual bias exists. United States v. Thompson, 483 F.2d 527, 528 (3rd Cir. 1973). The Supreme Court has held that

> [t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.

United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). Thus, the judge against whom the affidavit is filed may deny the affidavit for insufficiency when the allegations of bias relate to opinions formed during current or earlier proceedings. United States v. Story, 716 F.2d 1088, 1090 (6th Cir. 1983).

It appears that plaintiff's allegations of bias stem almost exclusively from the previous proceedings in this case. In its rather lengthy recitation of the facts, the court has tried to explain the reasoning behind its findings and conclusions throughout the hearings. Much of plaintiff's frustration in these proceedings ensues from plaintiff's ignorance of the rules and laws upon which he purports to rely. For example, in the last full paragraph on the second page of the Affidavit plaintiff recites the following:

> During the course of that same hearing [affiant's Motion for Stay Pending Appeal], the bankruptcy judge also said, without any apparent reason, and referring to my pending appeal of his Order of Abandonment, that he thought his order was correct, that he had read my

> arguments and that I would not win my appeal. During that same hearing, he denied my Motion for Stay Pending Appeal.

Because plaintiff made no effort to ascertain the legal grounds for a stay pending appeal, he apparently was not aware that a likelihood of success on the merits was an element that he needed to prove to be entitled to the requested relief. Similar actions have been taken on plaintiff's motions due to the legal insufficiency of his requests. Nevertheless, the court has taken every opportunity to move this adversary proceeding on to trial -- excusing both parties from alleged service deficiencies, improper filings and late filings. Plaintiff's perceived bias is nothing more than his dissatisfaction with the holdings in these proceedings.

One contention that may allege some extrajudicial bias concerns the judge's relationship with the Trustee. Plaintiff contends that the judge and the Trustee have an on-going relationship in this court such that it prevents the judge from exercising his duties with impartiality. This allegation is without foundation. The alleged relationship is merely that the judge is the court and the Trustee is another officer of that court. If such a relationship did arise to bias or prejudice, as contemplated by § 144, a sitting judge would never be able to preside over actions brought on behalf or against the standing Trustee. Additionally, there is nothing outside the purely professional relationship between the judge and the Trustee in this matter to support any showing of bias.

Thus, the Affidavit fails for legal insufficiency and the request for recusal pursuant to § 144 should be denied.

B. Recusal Pursuant to Section 455:

Section 455 is directed to the judge and is self-enforcing. Judges have a duty to evaluate the circumstances of each case and step aside if grounds for recusal exist under § 455(a) or § 455(b). 28 U.S.C. § 455. Recusal under § 455(a) involves an objective test; whether a reasonable person with knowledge of the facts and circumstances of the case would question the judge's impartiality. In re Beard, 811 F.2d 818, 827 (4th Cir. 1987). Section 455(b) outlines several specific circumstances that mandate recusal one of which is personal bias or prejudice. 28 U.S.C. § 455(b)(1).

Courts have held that § 455(a) is broader than § 144 because recusal does not depend on actual bias or prejudice, but may be required when the impartiality of the judge might reasonably be questioned. Gray v. University of Arkansas, 883 F.2d 1394 (8th Cir. 1989); Beard, 811 F.2d at 827; Crider v. Keohane, 484 F. Supp. 13 (D.C. Okl. 1979). The judge is not limited to the allegations submitted in plaintiff's § 144 Affidavit; he must consider all the known facts and circumstances to determine whether a reasonable person with that knowledge would question his impartiality. State of Idaho v. Freeman, 507 F. Supp. 706 (D.C. Idaho 1981).

Impartiality is often challenged by litigants claiming that the judge engaged in ex parte communications with the adverse

party. Colony Square Co. v. Prudential Ins. Co. of America, (In re Colony Square Co.), 819 F.2d 272, 275 (11th Cir. 1987); Beard, 811 F.2d at 827-29. Plaintiff stated in his Affidavit that upon the denial of plaintiff's motion for default for failure to Answer the Complaint "[the Trustee's] attorney immediately produced an Answer to the Complaint, which suggested that he must have had previous knowledge of the outcome of the hearing." Apparently, the Trustee's attorney was simply prepared for the hearing and any possible outcome. There was absolutely no ex parte contact with the Trustee or her attorney regarding the outcome of that or any other hearing in these proceedings.

Section 455(b)(1) is very similar to § 144 in that recusal is required where there is evidence that the judge holds a personal bias or prejudice towards one party. It is well settled that § 455 and § 144 "must be construed in pari materia," and disqualification under § 455 "must be predicated upon extrajudicial conduct rather than judicial conduct." United States v. Story, 716 F.2d 1088, 1090 (6th Cir. 1983); Beard, 811 F.2d at 827. The same analysis that led the court to deny plaintiff's request for recusal under § 144 leads the court to refrain from recusal under § 455(b)(1). Plaintiff's allegations stem from his dissatisfaction with the outcome of the proceedings in this case. Plaintiff's perceived bias is largely a result of his ignorance of the law and the duties imposed upon an individual who undertakes to represent himself in court. Plaintiff's behavior in the courtroom has tested the patience of the court, however, there is

no evidence that the perceived animosity contributed to the court's rulings in any of the proceedings. On the contrary, the court has made every effort to move the adversary proceeding to trial to determine plaintiff's rights on the merits.

**CONCLUSION**

**Plaintiff's Affidavit requesting that a new judge be assigned to the proceedings due to alleged bias and/or prejudice is without legal sufficiency and should be denied. In order to sustain a request for reassignment the affiant must come forward with facts that establish the that the judge has some extrajudicial bias for or against one party. That bias may not result from opinions that the judge has made during the course of the proceedings. Nothing in plaintiff's Affidavit supports the existence of bias as contemplated in § 144.**

**In addition, pursuant to § 455, a judge has an affirmative duty to withdraw from a case whenever the facts and circumstances suggest that his impartiality might reasonably be questioned or (among other situations not applicable to this proceeding) where the judge has a personal bias or prejudice concerning one party. A review of the facts in this case does not suggest that there is any reason for Judge Hodges to recuse himself. Plaintiff's allegations are without merit and there are no other circumstances which would warrant recusal. The requirement in § 144 that the bias must stem from some extrajudicial source is**

equally applicable in a determination of bias pursuant to § 455. As such, recusal is not warranted under either § 455(a) or § 455(b).

It is therefore **ORDERED** that:

1) Plaintiff's request for recusal pursuant to Title 28 U.S.C. § 144 is hereby denied; and

2) Recusal pursuant to Title 28 U.S.C. § 455 is not required.

This the 14th day of September, 1992.

George R. Hodges
United States Bankruptcy Judge